

**Chestnut Ridge Mining Corporation and United  
Mine Workers of America District 28 and Local  
Union 1470. Case 5-CA-14986**

15 December 1983

**DECISION AND ORDER**

**BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER**

On 22 August 1983 Administrative Law Judge James T. Youngblood issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Chestnut Ridge Mining Corporation, Russell County, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(e).

"(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Insert the following as paragraph 2(b) and re-letter the subsequent paragraphs:

"(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way."

3. Substitute the attached notice for that of the administrative law judge.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

**APPENDIX**

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT poll you to get you to vote to accept a reduction in wages in the absence of your exclusive collective-bargaining representative.

WE WILL NOT deal directly with you thereby bypassing United Mine Workers of America District 28 and Local Union 1470, the exclusive collective-bargaining representative.

WE WILL NOT lay off, discharge, or otherwise discriminate against you because of your activities on behalf of the above-named Union or any other union.

WE WILL NOT discourage membership in the above-named Union or any other labor organization of our employees by discriminating in regard to hire, tenure, or any other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Jimmy Lee Burkett immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

**CHESTNUT RIDGE MINING CORPORATION**

## DECISION

## STATEMENT OF THE CASE

JAMES T. YOUNGBLOOD, Administrative Law Judge: The complaint which issued on January 17, 1983, alleges that Chestnut Ridge Mining Corporation (the Respondent) discriminatorily discharged Jimmy Lee Burkett and bypassed the United Mine Workers of America District 28 and Local Union 1470 (the Union), the exclusive collective-bargaining representative of the Respondent's employees, and dealt directly with its employees in violation of Section 8(a)(1), (3), and (5) of the Act. The Respondent filed an answer admitting the jurisdictional allegations of the complaint, the supervisory status of certain individuals, the status of the Union as a labor organization, and that the unit as set forth in the complaint is appropriate,<sup>1</sup> but denies the commission of any unfair labor practices. This matter was tried before me on March 8 and 9, 1983, in Bristol, Virginia. All parties were represented at the hearing and following the hearing the General Counsel and the Respondent filed posttrial briefs which have been duly considered.

Upon the entire record in this matter, and from my observations of the witnesses and their demeanor, and after due consideration of the briefs filed herein, I hereby make the following

FINDINGS AND CONCLUSIONS<sup>2</sup>

## I. THE BUSINESS OF THE RESPONDENT

The Respondent, a Virginia corporation with an office and place of business in Russell County, Virginia, is engaged in the mining and production of coal. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent, a small bituminous coal operator, mines coal that belongs to Clinchfield Coal Company, a Division of Pittston Company, and in turn ships the coal

<sup>1</sup> The following employees of the Respondent constitute the unit appropriate for the purpose of collective bargaining within the meaning of Sec. 9(b) of the Act:

All employees of Respondent working in or about the mine, excluding coal inspectors, weigh bosses, clerks, engineering and technical personnel, superintendents, mine foremen, assistant mine foremen, supervisors, watchmen and office personnel.

<sup>2</sup> The facts found herein are a compilation of the credited testimony, the exhibits, and stipulations of fact viewed in light of logical consistency and inherent probability. Although these findings may not contain or refer to all of the evidence, all has been weighed and considered. To the extent that any testimony or other evidence not mentioned in this decision may appear to contradict my findings of fact, I have not disregarded that evidence but have rejected it as incredible, lacking in probative weight, surplusage, or irrelevant. Credibility resolutions have been made on the basis of the whole record, including the inherent probabilities of the testimony and the demeanor of the witnesses. Where it may be required I will set forth specific credibility findings.

to a Clinchfield preparation plant. For its services the Respondent is paid a certain amount of money for each ton of coal it mines and ships to the Clinchfield preparation plant.

For a considerable period of time, prior to this proceeding, the Respondent has recognized the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit described above.

The Respondent and the Union have maintained a series of collective-bargaining agreements, the most recent of which is effective by its terms for the period of June 7, 1981, to September 10, 1983.

The current collective-bargaining agreement contains the following provision:

## ARTICLE 1A—SCOPE AND COVERAGE

## Section(a) Work Jurisdiction

The production of coal, including removal of overburden and coal waste, preparation, processing and cleaning of coal and transportation of coal (except by waterway or rail not owned by Employer), repair and maintenance work normally performed at the mine site or at a central shop of the Employer and maintenance of gob piles and mine roads, and work customarily related to all of the above shall be performed by classified Employees of the Employer covered by and in accordance with the terms of this Agreement. Contracting, subcontracting, leasing and subleasing, and construction work, as defined herein, will be conducted in accordance with the provisions of this Article.

Nothing in this section will be construed to diminish the jurisdiction, express or implied, of the United Mine Workers.

## Section(c) Supervisors Shall Not Perform Classified Work

Supervisory employees shall perform no classified work covered by this Agreement except in emergencies and except if such work is necessary for the purpose of training or instructing classified Employees. When a dispute arises under this section, it shall be adjudicated through the grievance machinery and in such proceedings the following rule will apply: the burden is on the Employer to prove that classified work has not been performed by supervisory personnel.

Jimmy Burkett, the alleged discriminatee involved herein, worked for Clinchfield Coal Corporation at the Kent Branch Mine from February 12, 1973, until May 20, 1982, at which time he was laid off as a result of a mine shutdown. Burkett had a repairman's card in the Union and had worked as a repairman at the Kent Mine from 1978 until the time of his layoff. At no time did he ever receive any discipline at Kent Branch and he was eligible for recall by Clinchfield. Burkett was never a supervisor while working at the Kent Branch.

On August 4, 1982,<sup>3</sup> Burkett was hired and began working for the Respondent. On August 3, the day prior to his working for the Respondent, he was interviewed by Superintendent Lawrence L. Kendrick. During the course of this interview, Burkett testified that he informed Kendrick that he had previously worked for Clinchfield at Kent Branch and told Kendrick that he had experience on solid state equipment. According to Burkett, Kendrick informed him that the Respondent's mechanics did not belong to the Union and that the Respondent paid them \$105 a day because the Respondent utilized them to work at different mines. Contrary to the testimony of Superintendent Kendrick, Burkett denied that Kendrick discussed his being a supervisor, denied that Kendrick told him that he was being hired to supervise two other employees, and denied that Kendrick told him that he would receive a \$10 raise when Kendrick hired employees for him to supervise. He also denied that he ever told Kendrick that he worked as a supervisor when he worked for Clinchfield at Kent Branch. There was no one else present during the course of this interview.

Kendrick testified that he interviewed Burkett and that he hired Burkett as a supervisor. He thought Burkett had told him during the interview that he had previously worked as a supervisor at the Kent Branch, but admitted that he did not ask Burkett how long he worked in that capacity or how many people he supervised. Kendrick stated that he told Burkett that while he was a supervisor he would be paid more than union wages and that he would not be in a union job classification. He stated that he told Burkett that he was going to hire employees for him to supervise as soon as he could find qualified personnel. He also admitted that he never hired anyone and that Burkett was performing maintenance work for the entire time that he was employed by the Respondent and that he never supervised any employees. He also testified that he told Burkett during the interview that he would receive a \$10 raise when they hired people for him to supervise.

Kendrick also testified that Darrel Lawson, a mechanic like Burkett, was hired as a supervisor with no employees to supervise. In this regard he testified that both Lawson and Burkett worked on the same shift and that it was his intention to switch Lawson to another mine and hire two mechanics for him to supervise. However, he was never able to hire the additional personnel because they could not find qualified mechanics. Kendrick attempted to explain this situation by stating that Lawson would on occasion supervise his fellow supervisor Burkett. He steadfastly denied that Burkett and Lawson were just two mechanics working together stating that if that were the case they would have just earned the union wage.<sup>4</sup>

<sup>3</sup> Unless otherwise specified all dates refer to 1982.

<sup>4</sup> The Respondent's records reveal that Jack Bennett, classified as a mechanic, and claimed by the Respondent as not being a supervisor, was earning over \$1 an hour more than Lawson and Burkett while Burkett was employed, and is still earning \$1 more than Lawson although Kendrick states that Lawson is currently Bennett's supervisor.

From the foregoing it is abundantly clear to me that Jimmy Burkett was hired as a mechanic and not as a supervisor. It is also abundantly clear to me that Lawson, although not material to this case, was not a supervisor. It is very difficult for me to believe that the Respondent would have two mechanics working on the same shift, both classified as supervisors with no one to supervise. And yet testify that one supervisor supervised the other supervisor. Such a story to me is incredible. In any event, it is my conclusion, based on the credited testimony of Burkett and other witnesses of the General Counsel, that Burkett was a mechanic within the bargaining unit and not a supervisor as alleged by the Respondent. Therefore, I reject the defense raised by the Respondent that the discharge of Burkett was permissible as he was a supervisor.<sup>5</sup>

Burkett testified that he began working for the Respondent on August 4. He normally reported first to the supply house along with other mechanics to receive their orders for the day, which would include a list of equipment malfunctions from the day-shift mechanics which he and other mechanics would have to work on. He also received his daily instructions from Maintenance Supervisor Joe Baird. Burkett would then load his supplies on a scoop and proceed to the mine where he would first work on equipment that was inoperative from the day shift to get it operational, and if no equipment were down he would service the scoops, the pinner, the cutting machine, and the batteries for all the equipment. In this regard Burkett was required to check the oil in the equipment at least once a week and, if it needed oil or other servicing he completed these functions. He stated that the cutting machine had a bad leak which required him to add oil to it about every other night.

On September 1 around 3:15 p.m., when Burkett reported to work, Foreman Gary Horn advised the men that Superintendent Lawrence L. Kendrick wanted to see the men in his office. According to Burkett, Kendrick, Gary Horn, and one other management official, either Assistant Superintendent Steve Bailey or Joe Baird, were in the room.

Burkett testified that Kendrick started the meeting by stating that he guessed they all knew what this was about and advised them that in order for the mine to stay working the men were going to have to take a 10-percent cut in wages. Burkett testified that he told Kendrick that it was not up to the men to take a 10-percent cut in wages, that this was something that had to be discussed with the International Union. Burkett informed Kendrick that a union field representative should be present. Kendrick merely stated that he did not know anything about that, but responded that the owners were meeting with the Union on the district level trying to work something

<sup>5</sup> Gary Horn testified that he was the foreman on the second shift and was responsible for the safety of mechanics Lawson and Burkett, but that they received their orders from Joe Baird, the maintenance supervisor. Horn states that Lawson did not supervise anyone and that he was just a mechanic as was Burkett. Horn was called as a witness for the General Counsel, and no longer works for the Respondent. However, his testimony was straightforward and had a ring of truth and I credit his version to the extent that there is any discrepancy between his testimony and the testimony of the Respondent's witnesses.

out, and that he was there to get men to vote on the cut in wages. Kendrick informed the men that if they did not take the cut in pay they would be laid off and there would be no unemployment, because there was work and they were refusing to work. Kendrick also informed the men that this pay cut had been approved by the men on the first shift and that the second-shift employees were the only ones left to approve it. At the suggestion of one of the employees, Kendrick and the other supervisors left the room to allow the men to discuss the problem. The employees discussed the situation and Burkett told them that he did not have a right to take a pay cut because this had to come from the International Union, as it had a contract and he did not have the right to renegotiate that contract. He informed the men that it was up to them to do what they wanted to do and all the men seemed to agree that they should not take the cut, but they did not say anything about it.

Only Supervisor Kendrick and Horn returned, and Kendrick asked one of the men for his vote and receiving no response Burkett spoke up and told Kendrick that they were not supposed to be doing this; that he could not go along with it, he could not vote on it, and he could not take a cut in pay. Kendrick wrote Burkett's name on a piece of paper and put "no" next to it and then went down the line and asked all the other employees who responded "no." Kendrick informed the men that they would be laid off and at this point Burkett left the room.

Following the meeting, Burkett left with the rest of the employees and went with employee Robert Howard on the scoop. He testified that, as they were approaching the mine, Assistant Superintendent Steve Bailey and Kendrick came up to the scoop to talk to them. Burkett testified that Bailey told him that as of "tomorrow" night "you will be laid off, that will be your last shift." Bailey told him it had nothing to do with his work, his work was fine, but he had the least seniority and that he had to let him go. Burkett requested a layoff slip but Kendrick interrupted stating that he would not really be laid off but there would be no work until further notice. Burkett stated that he told Kendrick that he would need something to show that he was out of a job, but Kendrick refused his request.

Fellow employee Howard confirmed Burkett's testimony, and ex-foreman Horn testified that he was about 15 to 20 feet away during this conversation and heard only parts of it, but that he did hear Burkett being told that he could work that night and the next night, but that thereafter the Respondent would not need him anymore. Horn also states that the Respondent did not tell Howard that he would be laid off.

Burkett testified that on September 2 he went to the union hall and informed union official Clyde Lambert about the requested pay cut by the Respondent, and that he had protested the pay cut and thereafter had been told that he would be laid off.

When Burkett reported to work that evening he was confronted by Assistant Superintendent Bailey who told him he was to report to Kendrick's office. When Burkett entered the office, Kendrick asked him if he was servicing the equipment and Burkett replied "yes." Kendrick

then told him that a rear end differential had gone out on a scoop and, when they tore it down, "they didn't find but maybe a cup of gear oil in it." Burkett states that he told Kendrick that he was servicing the equipment and that he believed that this was about what happened yesterday at the meeting. Kendrick told him not to get smart and denied that this had anything to do with the meeting. At this point, Kendrick told Burkett that he would have to let him go. Burkett told Kendrick that he had been to the union district office and that Kendrick would be hearing from him.

Burkett states that he returned to the Union's District office and again met with Lambert who informed him that he would be setting up a meeting concerning his discharge. He and Lambert attended a first-step grievance meeting at the Respondent's Rosedale office with Company President Dennis Coleman along with Kendrick and Bailey for the Respondent.

According to Burkett, the Respondent advised the Union that it had no business in this matter because Burkett was a salaried employee with two men working under him. Kendrick contended that he had hired Burkett with the intention of hiring two men to work under him for him to supervise. Burkett told Kendrick that he was not told when he was hired that he would be a supervisor and that he did not have any "bossing papers." Burkett states that he asked if anyone had been fired before by the Respondent for equipment breakdown and Kendrick responded "no" but he expected the equipment to be serviced three times a week. Burkett told Kendrick that he had been doing that, which Kendrick denied and the meeting ended.

Later that day, union representative Lambert called Burkett and told his wife that Burkett's discharge had been converted to a layoff. Thereafter he received his last paycheck with a layoff slip attached and since then he has received unemployment compensation.

Burkett testified that at all times he serviced the equipment as he was required to do. He testified that, on September 1, he checked the gear oil in the scoops and serviced the scoops if they required oil. Although he admitted he could not specifically recall whether the scoops actually needed oil on September 1, he stated that if they did need oil he had properly serviced them. Burkett stated that it was possible that a rear end of a scoop could have gone down on September 1 but he states that a number of different things could have happened, including a misuse by a operator. He states that if a seal went bad or the bolts loosened up on the rear end, this could have caused the oil to run out, but he said this would have left a large puddle of oil and that this would have been noticed. He did not see any sign of any leaks on any of the scoops when he serviced them on September 1. Burkett testified that as of the time of the hearing Kendrick was the only person whom he had heard say that a scoop went out due to lack of oil or lack of maintenance. Burkett testified that he did not believe Kendrick and that this looked awfully funny to him that such a thing would happen on the day after he refused to take a pay cut.

Employees Robert Howard and Tony McDaniel and former foreman Gary Horn corroborate Burkett's testimony with regard to the September 1 meeting, stating that the purpose of the meeting was to get the employees to take a 10-percent cut in wages and to get the employees on the second shift to vote in favor of the pay cut; and if they did not take the pay cut the mine would be shut down and the employees on the second shift would be laid off. All three indicate that Burkett spoke up and stated that such a decision should come from the International Union and that a union representative should be present during this meeting.

Horn testified that when the management officials left the room Kendrick told him, "It don't seem like we're having any problems now but with one man, and we can get rid of him." Horn stated that Burkett was the only employee to protest during the meeting, and that when the supervisors returned to the room Burkett was the first man to speak up telling Kendrick that he would vote against the cut. Thereafter, each man individually voted against taking the pay cut. Howard testified that, after Burkett told Kendrick that he was voting no, Kendrick stated "you boys are mechanics. Remember that you're not in the union, and your vote may well depend on your job. Dennis can get rid of you the same as he can me."

All three witnesses, Howard, McDaniel, and Horn, testified that the purpose of the September 1 meeting was to discuss a 10-percent cut in wages, and all three denied that Kendrick discussed a change in the bonus plan during the course of the meeting. McDaniel testified that, shortly after Burkett's discharge, he met with Kendrick and Assistant Superintendent Bailey in Kendrick's office. McDaniel explained that the three men he worked with had decided to take the pay cut and that he went to Kendrick's office to tell him about this decision. McDaniel states that, when he told Kendrick that they would take the pay cut, Kendrick informed him that they were not going that route. He explained that the Respondent's attorney had informed the Respondent that it could not make a pay cut in that manner, apparently meaning that such a pay cut would have to be worked out with the Union.

Superintendent Kendrick testified that he conducted a meeting on September 1 with the evening shift employees and the purpose of the meeting was to inform the employees that they were revising the safety and bonus plan. He testified that prior to the meeting Dennis Coleman, the president of the Respondent, had informed him that Clinchfield was cutting back the Respondent's revenue by 10 percent, but that Coleman did not tell him what change there would be in the bonus. Kendrick testified that he told the employees during the course of the meeting that he did not know whether the change in the plan would be in their favor or against them. He admitted that this was contrary to his past practice in revising the bonus in that in the past he was able to tell employees what the actual change in the plan was, before they voted. Kendrick testified that a vote was taken at the meeting and Burkett voted against the change in the plan as did several other employees. Joe Baird corroborated Kendrick's testimony at least during the time when he

was present in the meeting. He stated that both Lawson and Burkett said that they were not going to take a cut in the bonus and that he did not hear the other men say anything. He also testified that he was not aware that the vote was taken during the course of the meeting. This vote was apparently taken during his absence. Kendrick also testified that Burkett and Horn were not invited to the meeting, that they came to the meeting on their own. He also denied that he told the employees that the mine would be shut down and denied that following the meeting he told Horn that he was going to get rid of Burkett.

Kendrick testified that following the meeting Assistant Superintendent Bailey told Burkett that, after September 2, there would be no work until further notice. He states that Burkett did ask for a layoff slip but that he told Burkett that this was only a temporary layoff and that everyone was being laid off until Clinchfield called him back. Bailey testified that the employees were laid off only for the Friday and Monday of Labor Day weekend. However, he states that he did not know that the layoff would only be for 2 days at the time he announced it and that he told all of the employees they would be laid off until further notice. Bailey testified that he did not tell Burkett that the layoff was just for the Labor Day weekend and explained that he did not know that it was just for the weekend at that time. However, in his affidavit Bailey stated that he did tell Burkett that the layoff was just temporary because Clinchfield was off for the Labor Day weekend.

Kendrick testified that he was the one to finally approve Burkett's discharge, and that Baird recommended his discharge with Bailey's concurrence. Kendrick stated that the same scoop rear end that went out on September 2 had also gone out on August 23 as a result of being "dry of grease" and it was unusual for a rear-end to go out so quickly. He stated that he thought it was Burkett's fault that the rear end went out on August 23, and that he had cautioned Burkett about service at that time.

Kendrick states that, on September 2, Bailey and Baird called him into the mine and when he arrived inside Bennett, the mechanic, had already pulled the rear end out of the scoop and there was no grease in the scoop. He states that Burkett's September 1 report reflected that he had serviced the scoop the night before. Kendrick admitted that he had not previously terminated an employee because of equipment breakdown and that aside from the two scoop rear ends going down he had not had any problems with Burkett's work.

Maintenance Foreman Baird testified that, on the day of Burkett's discharge, Bennett told him that the rear end of the scoop went out at 8:30 a.m. Baird states that he told Bennett to try and drive the scoop outside the mine but after about 60 to 70 feet the scoop locked up. He states that Bennett pulled the yoke out of the rear end and the bearings were burnt up and there was no grease in the scoop. Baird states that the scoops use 140-weight oil, which is called grease, and that a scoop rear end would hold approximately 5 gallons of this oil. Baird also testified that the scoop would have burned up only a small amount of this oil over a 6-month period. He testified that there were only two ways that the oil could

have leaked out of the scoop—a blown seal which would have been very easy to spot, and a bad gasket on the wheel but there would not have been much oil loss if that had occurred. Baird testified that it was Burkett's responsibility to check the oil and that there was no evidence that there had been an oil leak on the rear end. He states that the only explanation for the loss of oil was that it had not been serviced. Baird testified that he, Bennett, and Bailey worked on the rear end of September 2 and that he asked Bailey to assist him because he wanted to get the scoop operational for the second shift. He testified that Bennett did not break for lunch and should have been paid overtime. The Respondent's records reflect that Bennett was paid for only 8 hours straight time that day. Baird testified that they did not get the scoop operational by the start of the second shift and that the men from the second shift had to work on the scoop.

Baird states that the rear end that went out on September 2 was at least 6 months old. He also states that, the day before Burkett's discharge, the scoop had operated a full 8 hours on the day shift without any problems.

The Respondent's witness Bailey testified that he examined the rear end of the scoop on September 2 and that it did not have any oil in it. He reported that there was no evidence of any oil leaks and that the rear end looked like it had been dry for several days. Bailey testified that he was not aware of any way the oil could have leaked out of the scoop and there was no place in the mine to dispose of 5 gallons of oil if Burkett wanted to intentionally remove it.

President Coleman testified that in his expert opinion a scoop rear end could operate for a substantial period of time if it were one-half or one-third full of oil and that some oil would get to the bearings. Coleman testified that he did not examine the rear end of the scoop in question and admitted that it would take a very long time for 5 gallons of oil to burn out of a scoop through regular operation. Coleman testified, after hearing the testimony and questioning from the bench, that he had no doubt that the scoop had a leak in the rear end at some place or it would not have been out of grease. However, Coleman could offer no explanation why the mechanics could not find the leak.

It is the Respondent's position that Burkett failed to properly maintain the scoops as required, that as a result the rear end or differential of the scoop burned out on the September 2 day shift around 8:30 a.m., that Burkett stated that he did in fact service this equipment, and that it was for these reasons that Burkett was discharged. Thus, his discharge was for cause and had nothing to do with his union activities and, in any event, he was a supervisor, and his discharge did not violate the Act.

#### Discussion and Conclusions

This case primarily turns on the credibility of the witnesses called on behalf of the parties. In resolving credibility I have carefully analyzed all of the facts presented through the testimony of the witnesses as well as the use of common sense in connection with the mystery of how the oil got out of the differential of a scoop, if in fact it got out of the scoop at all.

From this record it appears to me that the differential of a scoop is somewhat like the differential on an automobile or on a truck. They are sealed units containing gear oil with seals, gaskets, and plugs holding the oil in place. Although the gear oil in the differentials of automobiles as well as trucks must be checked on a periodic basis, unless there is a leak in that differential, that is, unless a seal is broken or some gasket is broken, or there is a crack in the differential housing, the adding of oil to a differential is very uncommon. Many vehicles operate for years with the initial filling of gear oil and no oil need be added. While these scoops are somewhat different and hold quite a lot more of oil than do automobiles, their function is practically the same. And, according to the testimony of the Respondent's own witnesses, oil could not escape from these differentials in the absence of some kind of rupture of a seal, a breaking of a gasket, or some other damage to the equipment. According to Respondent's own witnesses the equipment would operate for substantial periods of time without oil being added in the absence of some problem with the differential. The record also reflects that, in order for this differential to leak all of the oil out of it as contended by the Respondent, there would necessarily be some evidence of a leak unless the oil was deliberately taken out and discarded. There is no contention by the Respondent that Burkett deliberately drained the oil from the gear housing of the scoops and discarded it and there certainly is no evidence to that effect. The contention by the Respondent is that Burkett failed to service the scoops and somehow the oil got out of it.

From the evidence presented in this case, and from general knowledge of the operation of a differential, it is my conclusion that a differential does not become dry for lack of service. Differentials become dry because oil escapes from them. They generally do not become dry through use unless that use is extended over a considerable period of time. It is further my conclusion that had these differentials been leaking as a result of a rupture of a seal or a gasket that would have been noticed by the naked eye. Therefore, it is my conclusion that the rear end either did not go out of this scoop as alleged by the Respondent or, if it did go out as alleged by the Respondent, it was a result of misuse on the day shift following the last night shift when Burkett serviced the equipment. Thus, it is my conclusion that lack of service could not have caused this differential to go bad unless that lack of service had extended over a considerable period time and certainly during that period of time someone other than Burkett would have noticed that this differential had no oil in it. And as I indicated the only way that oil could disappear would be through a leak which most certainly would have been noticed by someone. Therefore, it is my conclusion that the reason assigned for Burkett's discharge by the Respondent was a pure pretext, and that his discharge was for some other reason.

According to the credited testimony of the General Counsel's witnesses, Burkett, Howard, McDaniel, and Horn, there is little doubt that the purpose of the September 1 meeting of the employees held by Kendrick

was to get them to vote to accept a 10-percent cut in pay. Although the Respondent's witnesses gave testimony that the purpose of this meeting was to get the employees to give up some form of bonus, I do not credit that testimony. The testimony of the General Counsel's witnesses in this regard was straightforward and had a ring of truth, whereas the testimony of Kendrick and other witnesses of the Respondent was confusing and in many instances made no sense, as in the case of the burned-out scoop rear end.

Therefore, it is my conclusion that the Respondent bypassed the collective-bargaining representative by going directly to the employees seeking to get them to vote on a decrease in wages in derogation of the collective-bargaining agreement and in derogation of the collective-bargaining representative. There is no doubt that this constitutes a clear violation of Section 8(a)(5) and (1) of the Act, and I so find. Additionally, it is my conclusion the Respondent threatened the discharge of the employees if they failed to vote "yes" on the acceptance of the 10-percent cut in pay. Finally, because of my findings in this regard, it is my conclusion that this was the reason the Respondent ultimately discharged Burkett.

Burkett spoke out at the meeting and informed the Respondent that it must consider this matter with the Union and that it was not a proper subject to be discussed with the employees. Thus, there is little doubt that at this point Burkett was engaging in activities in support of the Union, and that the Respondent was well aware of this fact.

It is also my conclusion that this was the reason that the Respondent discharged Burkett and that its assigned reason was pretextual, and that the Respondent discharged Burkett because of his activities on behalf of the Union to discourage membership in the Union, or support for the Union, in violation of Section 8(a)(3) and (1) of the Act, and I so find.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent as set forth above, occurring in connection with the Respondent's operations, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As I have found that the Respondent discriminatorily discharged Jimmy Burkett on September 2 in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that the Respondent be ordered to offer Burkett immediate and full reinstatement, unless reinstatement has already been offered, to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and make him whole for any loss of earnings he

may have suffered as a result of the Respondent's discrimination against him, until such time as the Respondent makes him a valid offer of reinstatement with interest. See *F. W. Woolworth Co.*, 90 NLRB 289 (1950); *Florida Steel Corp.*, 231 NLRB 651 (1977).

On the foregoing findings of fact and the entire record, I make the following

#### CONCLUSIONS OF LAW

1. Chestnut Ridge Mining Corporation, the Respondent, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Mine Workers of America District 28 and Local 1470 are labor organizations within the meaning of Section 2(5) of the Act.

3. All employees of the Respondent working in or about the mine, excluding coal inspectors, weigh bosses, clerks, engineering and technical personnel, superintendents, mine foremen, assistant mine foremen, supervisors, watchmen and office personnel, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein the United Mine Workers of America District 28 and Local Union 1470 have been the exclusive collective-bargaining representative of the Respondent's employees in the unit described above.

5. By polling its employees and getting them to vote on a decrease in pay in the absence of the Union, the exclusive collective-bargaining representative of the Respondent's employees, the Respondent thereby dealt directly with the employees seeking to negotiate a reduction in their wages in violation of Section 8(a)(1) and (5) of the Act.

6. By discharging Jimmy Lee Burkett because of his support or assistance to the Union in order to discourage employees from engaging in such activities, the Respondent has violated Section 8(a)(1) and (3) of the Act.

The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the basis of the entire record, the findings of fact, and the conclusions of law, and pursuant to Section 10(c) of the Act, I issue the following recommended

#### ORDER<sup>6</sup>

The Respondent, Chestnut Ridge Mining Corporation, Russell County, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Polling its employees to get them to vote to accept a reduction in wages in derogation of the exclusive collective-bargaining representative.

(b) Dealing directly with its employees thereby bypassing the Union, the exclusive collective-bargaining representative.

<sup>6</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Laying off, discharging, or otherwise discriminating against its employees because of their activities on behalf of the Union, or any other labor organization, to discourage membership in the Union or any other labor organization of its employees.

(d) Discouraging membership in the Union or any other labor organization of its employees by discriminating in regard to hire, tenure, or other terms and conditions of employment.

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to Jimmy Lee Burkett, unless reinstatement has already been offered, to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered as a result of the discrimination against him with interest.

(b) Post at its facilities in and around Russell County, Virginia, copies of the attached notice marked "Appendix."<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not found herein.

<sup>7</sup> If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."